Maine Association of Criminal Defense Lawyers

P.O. Box 434, Freeport, Maine 04032
(207) 865-1457 FAX (888) 474-7198
info@mainemacdl.org

December 10, 2012

State of Maine
Supreme Judicial Court
205 Newbury Street, Room 139
Portland, Maine 04112-0368

RE: Proposed Amendments to Maine Rules of Criminal Procedure

Dear Supreme Judicial Court Justices,

The Maine Association of Criminal Defense Lawyers [MACDL] appreciates the effort of the Supreme Judicial Court to create a rule to address the United States Supreme Court decisions in *Missouri v. Frye*, __U.S. __, 132 S.Ct. 1399 (2012) and *Lafler v. Cooper*, __U.S.__, 132 S.Ct. 1376 (2012). The proposed amendment is to create a new Rule 11C. MACDL has several concerns regarding this proposal that it wishes the Court to consider.

In reference to Proposed Rule 11C(a), MACDL understands the Court's concern regarding whether a formal offer is oral or in writing, due to the common practice of prosecutors offering settlements to defendants at the time of an arraignment. Many of those offers expire on the same day. Just as often, however, no attorney for the accused is present or involved in the negotiation. In such circumstances, the concerns regarding attorney representation in *Frye* and *Lafler* simply are not present. If the offer is made with a Lawyer of the Day [LOD], the problem in *Frye* and *Lafler* still is not present, inasmuch as no prior offer could have been extended and therefore rejected. For those offers which are rejected prior to having an attorney make an appearance on behalf of an accused, it would be more appropriate to have such an oral offer deemed to be an "informal offer," and therefore not subject to the scope of *Frye* and *Lafler*, as LODs usually are not afterwards appointed to represent the persons appearing at arraignments.

If an attorney for the accused has made an appearance on the record, there usually have been conversations between the prosecutor and defense attorney regarding resolution of the case. At this stage in the proceedings, MACDL sees no impediment to having the prosecuting attorney reduce any "firm" offer, including an expiration date, in writing. It need not be in a formal letter, but may be forwarded in an e-mail or handwritten.

Having terms of an agreement subject to the rule be reduced to writing obviates later disagreements as to whether there were prior offers (as opposed to statements made in negotiations) and also creates a document that is not only in the prosecutor's file, but also in the defense attorney's file. Having the original offer be in writing and in two separate files decreases the chance that a later ineffective assistance claim may result from an honest misunderstanding as to the

nature or availability of an offer. Although MACDL understands the Court's concern in defining a "formal offer" too narrowly, and therefore depriving a defendant of fair notice of a possible plea agreement, the parties retain the same interest in settling cases. Requiring a formal offer to be in writing places a very slight burden on a prosecutor, because *any* form of writing would comply with the rule. The creation of an amorphous standard for offers subject to the rule, however, may create more problems than it solves.

Based on these concerns, MACDL encourages the Court to consider amending Proposed Rule 11C(a) to read as follows:

(a) **Definition of a Formal Offer.** A formal offer for a plea agreement has definite terms in accordance with Rule 11A(a) and is more than an informal exploration. It should contain the date, event or other circumstance upon which the offer will expire or be cancelled. It shall be in writing.

In reference to Proposed Rule 11C(b), if a formal offer for a plea agreement is in writing, then this section may be shortened to require counsel for the accused to communicate the offer to the defendant. A written offer will often be self-explanatory, and therefore will foreclose any future dispute as to what may have been explained. Having a written offer allows substituting attorneys for either side to have the agreement memorialized in the file. The rule, as proposed, might create a record for a future ineffective assistance claim, but would not promote the effectiveness of such assistance initially rendered. Inquiring into the discussion had between an accused and her attorney prior to any post-conviction proceeding would violate the attorney-client privilege. Thus, the proposed rule creates additional burdens (and costs to the State in court-appointed cases) without advancing any identifiable interest created by *Lafler* or *Frye*.

Based on these concerns, MACDL encourages the Court to consider amending Proposed Rule 11C(b) to read as follows:

(b) **Duty of Defense Counsel.** A defense counsel who receives from the attorney for the state a formal offer for a plea agreement must promptly communicate that offer to the defendant.

In reference to Proposed Rule 11C(c), the Rule establishes procedures which the court may take in accepting a plea or proceeding to trial, but does not establish actions a court may take should it find indications that an offer was not communicated to a defendant. It also creates a possible intrusion into the attorney-client privilege when a court asks a defendant as to that person's understanding of the agreement. It is a common practice for a court, before accepting a plea under the current rules, to inquire of the defendant if she understands the consequences of pleading guilty, including the recommended disposition of the parties. The decisions in *Lafler* and *Frye* should not affect that procedure. In addition, the prospect of "do overs" is reduced, especially in regard to trials, if the Court simply inquires as to whether the appropriate level of communication has occurred, without also delving into the details of those privileged conversations.

Based on these concerns, MACDL encourages the Court to consider amending Proposed Rule 11C(c) to read as follows:

(c) **Duty of Court.** Prior to the acceptance of any plea of guilty or nolo contendere or prior to jury selection for a jury trial or the start of a bench trial, the court shall inquire of the attorney for the state whether there was a formal plea offer, and if so, whether more than one such offer was made. If a formal offer was made it shall inquire of defense counsel whether any formal offer was communicated and explained to the defendant. The court shall inquire of the defendant if he or she received any formal offer made by the attorney for the state. If a formal offer was not received by the defendant, the court may order a recess to allow the parties to confer, or order such other relief as justice may require.

MACDL, as an organization, appreciates the care with which the Court is attending to the issues created by the opinions in *Frye* and *Lafler*. However, concern regarding the possibility of future Post Conviction Relief petitions should not infringe on a present attorney-client privilege. MACDL believes that the recommended changes to the Proposed Rule 11C both guarantees defendants the right to consider settlements offered by the State, as well as protect privileged communications between an attorney and her client.

Sincerely,

Richard L. Hartley
MACDL President

MAINE COMMISSION ON INDIGENT LEGAL SERVICES
John D. Pelletier, Esquire
Executive Director

December 12, 2012

Maine Supreme Judicial Court
205 Newbury Street, Room 139
Portland, ME 04112

Re: Proposed Addition of Rule 11C to the Maine Rules of Criminal Procedure

To the Honorable Justices of the Supreme Judicial Court:

I write to submit comment on behalf of the Maine Commission on Indigent Legal Services with respect to the proposed addition of Rule 11C to the Maine Rules of Criminal Procedure.

First, the Commission agrees that it is the duty of defense counsel to communicate any plea offer made by the State to the defendant for consideration. Moreover, consideration by the defendant necessarily entails counsel ensuring that the defendant has a sufficient understanding of the terms and consequences of the plea offer to intelligently weigh whether to accept or reject the offer. Accordingly, to the extent that the proposed rule seeks to promote good practice, the Commission shares that goal, and in fact, the Commission has embraced this practice in its Criminal Practice Standards. See Chapter 102: Standards of Practice for Attorneys who Represent Adults in Criminal Proceedings, § 7, (8), (C).

Nevertheless, the Commission is concerned that the rule's documentation requirement is ambiguous and could be interpreted to impose a time-consuming burden on defense counsel that will cause an unnecessary increase in the cost of indigent representation. The rule provides that "[d]efense counsel must memorialize the date of receipt, the communication and the explanation" of the plea offer to the defendant. This phrase could describe anything from 1) a brief note in the file that on a given date an offer was received, conveyed, and explained to the defendant; to 2) a three page letter to the defendant containing the terms of the offer, an in-depth analysis of the merits of the offer versus proceeding to trial, and the sometimes myriad direct and collateral consequences of any plea of guilty. In the Commission's view, were the rule to be interpreted to require the latter communication in every case, such documentation would not be an efficient use of counsel's time and would unnecessarily increase the Commission's costs at a time of tight budgets and limited state resources.

The goal should be to ensure that all plea offers are communicated to the defendant and that the defendant has a sufficient understanding of the offer to make an intelligent decision. Achieving this goal should not require unnecessary "papering of the file" and the expense associated with such a practice. The Commission suggests that the proposed rule be amended to state with specificity what is required of defense counsel and that any requirement be only as burdensome as practically necessary to ensure "good practice," and hence, constitutionally adequate representation.

John D. Pelletier, Esq.
Executive Director

154 State House Station, Augusta, Maine 04333
(207) 287-3257 • (207) 287-3293 Fax
www.maine.gov/mcils

Comment from Andrews Bruce Campbell, Esq., of Bowdoinham, received November 28, 2012:

> Conveying an offer is standard practice. We increasingly increase the complexity of rules, forms, etc. and I would hope that the amendment of the rule to include the duty to communicate a plea offer, an obvious duty, need not be subject of a Rule.
>
> Andrews B. Campbell

Comment from Maurice Porter, Esq., of Norway, received December 9, 2012:

> This proposal is unnecessary, invasive, degrading, and ineffective.
>
> I am already obligated by the Rules of Professional Responsibility (and now Frye) to promptly, fully, and accurately communicate to my clients offers from the prosecution, as well as myriad other communications. If I fail to do so, there are already remedies and sanctions available.
>
> Why violate the virtually sacrosanct attorney-client privilege? And at such a crucial part of the process?
>
> Who is "memorializing" this "formal offer?" The prosecutor? The defense attorney? And, then when there is a dispute between the court and defense counsel regarding what the "formal offer" was and it's conveyance to the defendant, is it the then the State Prosecutor who will step in with their version of the"formal offer" (which they may or may not have memorialized)?
>
> WIll there be a parallel rule whereby the court will query the prosecutor as to whether she has fulfilled her legal obligations? WIll the court ask, for example, if the prosecutor actually listened to/watched all of the digital recordings? Ask the prosecutor if she received assurances in writing from each involved law enforcement officer that all possible suspects were fully investigated?

I can only surmise what the issue the court is really addressing here are all the appeals/PCR filings alleging the defense attorney failed to promptly, fully, and accurately communicate to the defendant matters of import affecting defendants' decisions. As mentioned above, there are already mechanisms in place to deal with shortcomings of defense counsel. This appears to be a blunt, reactive shortcut with lots of unintended (I presume they are unintended) consequences.

This will not make attorneys more productive, professional, or affective. In fact, this amendment will make defense attorneys less productive, make us appear unprofessional and untrustworthy, and it will degrade attorney-client confidence.

I respectfully request that this proposal not be adopted. It also could have been a situation where whoever drafted this and proposed it would've come up with something better had they reached out to defense counsel and sought their input.

Maurice Porter, Esq.
PO Box 184
Norway, ME 04268
207-671-3755

Comment from Stephen J. Schwartz, Esq., of Portland, received December 9, 2012:

To the Honorable Justices of the Maine Supreme Judicial Court:

I am writing to express my concern about the Court codifying in rule what defense counsel must do in practice anyway. The proposed change is concerning for a number of reasons.

First, there is concern about judges becoming actively involved in plea negotiations and making those discussions part of a colloquy at the Rule 11 proceeding. At our dispositional conferences, knowledge of plea discussions by the judges and justices can be very helpful. However, the courts have taken pains to not reflect in the court file the plea discussions, for fear of tainting the proceedings with respect to

the trial judge. It now appears that plea discussions, insofar as they may contain a "formal" offer—however that term may be defined—are not only to be part of the record, but also public in nature. This could have a deleterious effect on the discourse that must necessarily take place between State's attorneys and defense counsel, since, as noted in Frye, over 95% of cases are resolved with plea bargains. If plea negotiations are public in nature, or always discoverable by the Court, it is certainly possible that the State will not feel as free to offer dispositions that may be more palatable. That, in turn, could lead to an overcrowded docket, burdening the courts.

Second, frankly, there is something distasteful about having a further requirement by fiat of rule change imposed upon defense counsel, who are officers of the court and must ethically convey offers to their clients anyway. When this Court adopted the Model Code of Professional Responsibility in 2009, it purposefully chose not to impose in Rule 3.8 several paragraphs in the model rules incumbent upon prosecutors to do justice. What was left out of that rule bears mention: the Maine rule does not include provisions of the model rules requiring that prosecutors 1) must make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel; 2) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing; 3) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule; 4) when he or she knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor's jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit; and finally,

5) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Presumably, the Court reasoned that prosecutors would be duty-bound to follow rules of decency, justice, and ethics, without having to codify that behavior in a rule (the comment to rule further indicates that the model rules go too far in their admonitions to prosecutors, and possibly implicate the First Amendment).

The same should be true of the role of defense counsel. Rule 1.4 of the Code of Professional Responsibility requires counsel to promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by the Rules. Though there is now a SCOTUS case making clear how important it is to convey plea offers to clients, it does not necessarily follow that there needs to be an on the record colloquy essentially asking a defendant if his or her lawyer complied with the rules of professional responsibility. Further, the proposed change could also have the effect of impinging upon the attorney-client relationship by forcing a defendant to reveal communications with counsel that may otherwise be privileged.

Third, while it is well-settled that plea agreements are contracts, although an offer must be conveyed to our clients, even if accepted, the prosecutor can pull the offer prior to entry of the plea, absent a showing of detrimental reliance on the offer. If the Court is inclined to add a provision to Rule 11 requiring a colloquy between the court and the defendant to ensure that defense counsel is adhering to his or

her duties under the rules, then perhaps it should also add a provision in the rules that plea offers once accepted by the defendant are deemed contracts binding upon prosecutors (with any ambiguity therein construed against the drafter). Otherwise, the admonition to convey an offer could be meaningless, and further undermine the sometimes delicate attorney-client relationship.

Finally, the system of offer and acceptance in the area of plea negotiations can be somewhat problematic. For example, prosecutors in some jurisdictions give quick offers on the day of arraignment that expire on that day. Sometimes, even counsel does not know about them. Further, some prosecutors will make an offer significantly worse once someone has counsel than the offer to the accused when he or she appears pro se at arraignment. For example, after entering an appearance by mail for an infraction or misdemeanor, on more than one occasion I have received with discovery a written offer that expired on the date of arraignment-- an offer that was also offered to co-defendants who appeared pro se. Later, my client has been offered something more harsh in court because my client had the audacity to delay the proceedings and seek counsel. It is difficult to perceive how knowing about a prior offer would be helpful to the attorney-client relationship. That may not be the intent of the rule change, but it bears note that this type of prosecutorial conduct is occurring in some jurisdictions, and perhaps it should be addressed at least in the comments of any rule change, as it may implicate the Sixth Amendment right to counsel.

I recognize that courts throughout the country will try to find the best way to deal with the rights implicated in the Frye and Lafler decisions. I would hope that the rules of professional conduct currently in effect are sufficient to hold defense counsel to our duties, and also ensure that substantial rights of the accused are not being overlooked.

If this Court is inclined to further investigate this issue before imposing an amendment to Rule 11, I would be pleased to assist in that endeavor, supplementary or in conjunction with the work of the Criminal Rules Committee.

Thank you for the opportunity to be heard.

Respectfully,

Stephen J. Schwartz

Stephen J. Schwartz
Schwartz & Schwartz, P.A.
P.O. Box 15337
Portland, ME 04112-5337
Phone: (207) 774-6111
Fax: (207) 774-7193

Comment from Merritt Heminway, Esq., of Portland, received December 9, 2012:

Hon. Chief Justice Saufley, and May it Please the Court:

I write to highlight my concerns over the proposed addition of M. R. Crim. P. 11C.

As you know, the Bar Rules and the Code of Professional Responsibility already require me, as defense counsel, to promptly communicate and explain any offer of settlement to the client. Sometimes counsel has the luxury of communicating offers to the client by letter. Often, however, in the fast-paced negotiations that occur in crowded courtrooms and hallways, formal offers must be communicated and explained very quickly, and memorialized only in counsel's notes. As officers of the court, defense counsel take pride in our ability to meet our ethical responsibilities in extremely hectic environments--this skill set, along with the those of talented prosecutors, clerks, and marshalls, allow the criminal dockets to move efficiently. As such, I believe proposed part (b) is unnecessary and a bit silly.

More concerning is proposed part (c), as it looks like an invitation to judicial meddling in the sausage making that we call modern plea negotiation. I suppose, at the time of plea, I can assure the Court that

I have met my obligation to inform my client of offers, but I do not believe I can recite to the Court the details of said offer while honoring my obligation to protect attorney/client communication, for then the entire courtroom will know, by virtue of the procedural posture of a plea, the details of my advice to my client. Additionally, in the context of an open plea, the details of settlement negotiations may improperly influence a judge's sentencing decision. If I think it helpful for the Court to know the details of negotiations, that should be off-the-record in the context of a dispositional conference in chambers with a judge who will not preside at trial or make a sentencing decision. Putting the actual offers on-the-record makes me very nervous as there is considerable risk of both myself and the presiding judge running afoul of our ethical responsibilities. If we must have a part (c), I urge you make it clear that the details of actual offers are off-limits to judicial inquiry.

With respect and gratitude,

Merritt.

Comment from Harold J. Hainke, Esq., of Whitefield, received December 10, 2012:

To the Honorable Justices of the Maine Supreme Judicial Court:

I fully support the comments made by Stephen J. Schwartz, Esq and will not repeat them here.

I do not believe the proposed Rule 11 C is helpful or necessary. In fact, it appears to me to be harmful. It is not necessary because the Rules of Professional Responsibility obligate the defense attorney to pass on all formal offers and this is the common practice. The proposed rule, by codifying formal offer, will hurt defendants who have incompetent attorneys who did not advise them of a plea offer and later claim that the offer was not formal because the offer was not in writing and the date, event or other circumstance upon which the offer will expire or be cancelled was not discussed. Many times a plea offer is given without these details, yet the defendant has a right to know about it. If the defendant pleads open without accepting the offer because he did

not know about it and a different prosecutor is in court at the time of the guilty plea and offer is not referred to in the DA file, the Defendant's rights have been compromised.

In the proposed rule Defense counsel must memorialize the date of receipt, the communication and explanation to the client. Why aren't the prosecutors obligated to give a written offer? That would avoid the problem mentioned above and could be the definition of a formal offer.

Harold J. Hainke, Esq.
Hainke & Tash
P.O. Box 192
Whitefield, ME 04353-0192
Office Location: 72 Winthrop St. Augusta, Maine
Tel. (207) 549-7704
Fax (855) 877-3737
